

**BEFORE THE
SURFACE TRANSPORTATION BOARD**



STB Docket No. AB-6 (Sub-No. 463X)

228200

**BNSF RAILWAY COMPANY – ABANDONMENT EXEMPTION – IN KING COUNTY,
WASHINGTON
(Redmond Spur, MP 0.00 to MP 7.30)**

228202

STB Docket No. AB-6 (Sub-No. 465X)

**BNSF RAILWAY COMPANY – ABANDONMENT EXEMPTION – IN KING COUNTY,
WASHINGTON
(Woodinville Subdivision, MP 11.25 to MP 23.80)**

228204

STB Finance Docket No. 35407

**GNP RLY INC. – ACQUISITION AND OPERATION EXEMPTION – REDMOND SPUR
AND WOODINVILLE SUBDIVISION – VERIFIED PETITION FOR EXEMPTION
PURSUANT TO 49 U.S.C. § 10502**

**REPLY OF KING COUNTY, WASHINGTON
TO MOTION OF GNP RLY, INC., FOR PROTECTIVE ORDER**

Communications with respect to this pleading should be addressed to:

Charles A. Spitulnik
W. Eric Pilsk
Allison I. Fultz
KAPLAN KIRSCH & ROCKWELL LLP
1001 Connecticut Avenue, N.W., Suite 800
Washington, DC 20036
(202) 955-5600
E-mail: cspitulnik@kaplankirsch.com
E-mail: epilsk@kaplankirsch.com
E-mail: afultz@kaplankirsch.com

Counsel for King County, Washington

Dated: November 9, 2010

ENTERED
Office of Proceedings
NOV 10 2010
Part of
Public Record

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Docket No. AB-6 (Sub-No. 463X)

**BNSF RAILWAY COMPANY – ABANDONMENT EXEMPTION – IN KING COUNTY,
WASHINGTON
(Redmond Spur, MP 0.00 to MP 7.30)**

STB Docket No. AB-6 (Sub-No. 465X)

**BNSF RAILWAY COMPANY – ABANDONMENT EXEMPTION – IN KING COUNTY,
WASHINGTON
(Woodinville Subdivision, MP 11.25 to MP 23.80)**

STB Finance Docket No. 35407

**GNP RLY INC. – ACQUISITION AND OPERATION EXEMPTION – REDMOND SPUR
AND WOODINVILLE SUBDIVISION – VERIFIED PETITION FOR EXEMPTION
PURSUANT TO 49 U.S.C. § 10502**

**REPLY OF KING COUNTY, WASHINGTON
TO MOTION OF GNP RLY, INC., FOR PROTECTIVE ORDER**

King County, Washington, a political subdivision of the State of Washington (the “County”), hereby responds to the October 27, 2010, Motion of GNP Rly, Inc. (“GNP”) for a Protective Order (the “GNP Motion”) in above-captioned proceedings.

The form of Order proposed by GNP is overbroad because there are no valid commercial reasons to keep the personnel of the County and its counsel from having full access to any information that may be relevant to this matter. The County is a public entity within the State of Washington, and has no competitive or commercial interest in GNP’s business records.

Accordingly, the County respectfully requests that the draft Order attached to this Motion should be entered in lieu of the draft order submitted by GNP.

A Protective Order is typically designed to protect commercially sensitive data from competitors. *See Canadian National Rwy. Co. – Trackage Rights Exemption – Detroit River Tunnel Co.*, STB Finance Docket No. 34001 (Service Date Mar. 9, 2001), *slip op.* at 1.

“Competition” is defined as “the effort of two or more parties acting independently *to secure the business of a third party* by offering the most favorable terms”; a “competitor” is “one selling or buying goods or services *in the same market* as another.” WEBSTER’S NEW COLLEGIATE DICTIONARY, 227-228 (1981) (emphasis added). Here, the fundamental element of a competitive relationship – multiple players vying for business in a common market – is entirely absent. The County may require access to, or may wish to rely upon, relevant material GNP considers commercially sensitive, but the County is a commercial entity and is not a competitor of any commercial freight rail service offered by GNP.

Because the County and other public agencies that may wish to participate herein would not compete with GNP’s proposed operations, the form of protective order proposed by GNP is not required.¹ A protective order that allows the parties and their counsel to review confidential and highly confidential material for purposes of this Proceeding but prohibits disclosure to others fully protects GNP’s interests *and* the interests of the County. That approach, as reflected in the proposed Protective Order attached to this Motion as Appendix A, is consistent with Protective Orders adopted by this Board in cases involving public entities that have no competitive,

¹ The County notes that as part of its Comments on GNP’s Petitions it is citing to, and attaching as an exhibit, GNP’s response to a Request for Quote for freight rail service on the Woodinville Subdivision between Woodinville, WA and Snohomish, WA. The County received a copy of that document from another public entity without any restrictions on its use. The County notes, however, that the document is marked “Confidential” and that it contains information that GNP may consider commercially sensitive. In an excess of caution, therefore, the County intend to treat that document as “Confidential” pursuant to the proposed Protective Order submitted herewith.

commercial interest in the transaction at issue. *See, e.g., The City of Alexandria, Va.—Petition for Declaratory Order*, STB Finance Docket No. 35157 (Service Date Dec. 29, 2008).

For the reasons stated above, the County respectfully requests that the Board issue a Protective Order in the form that is attached to this Motion as Appendix A.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Charles A. Spitulnik", is written over a horizontal line.

Charles A. Spitulnik

W. Eric Pilsk

Allison I. Fultz

Kaplan Kirsch & Rockwell, LLP

1001 Connecticut Ave., N.W. Ste. 800

Washington, DC 20036

(202) 955-5600

Attorneys for King County, Washington

Date: November 9, 2010

APPENDIX A
PROTECTIVE ORDER

1. For purposes of this Protective Order:
 - (a) “Confidential Documents” means documents and other tangible materials containing or reflecting Confidential Information.
 - (b) “Confidential Information” means traffic data (including but not limited to waybills, abstracts, study movement sheets, and any documents or computer tapes containing data derived from waybills, abstracts, study movement sheets, or other data bases, and cost work papers), the identification of shippers and receivers in conjunction with shipper-specific or other traffic data, the confidential terms of contracts, confidential financial and cost data, and other confidential or proprietary business or personal information.
 - (c) “Designated Material” means any documents designated or stamped as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” in accordance with paragraph 2 or 3 of this Protective Order, and any Confidential Information contained in such materials.
 - (d) “GNP” means GNP Rly, Inc.
 - (e) “Highly Confidential” means information or documents containing shipper-specific rate or cost data, trackage rights compensation levels, or other competitively sensitive or proprietary information.
 - (f) “King County” means King County, Washington.
 - (g) “Public Entity Party” means any of King County or any other party to this proceeding that is a state, local, or regional governmental entity or authority.

(h) “Proceedings” means those before the Surface Transportation Board (“the Board”) concerning any directly related proceedings covered by STB Finance Docket No. 35407, Docket No. AB-6 (Sub-No. 463X) and Docket No. AB-6 (Sub-No. 465X), and any related proceedings before the Board, and any judicial review proceedings arising from the same or from any related proceedings before the Board.

(i) “STB” means the U.S. Surface Transportation Board.

2. If any Public Entity Party, as a party to these Proceedings, determines that any part of a document it submits, discovery request it propounds, discovery response it produces, transcript of a deposition or hearing in which it participates, or pleading or other paper to be submitted, filed, or served in these Proceedings contains Confidential Information or consists of Confidential Documents or Highly Confidential Documents, then that party may designate and stamp such Confidential Information and Documents as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL.” Any information or documents so designated or stamped as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” shall be handled as provided for hereinafter.

3. If GNP as a party to these Proceedings, or any person acting on behalf and at the direction of GNP, determines that any part of a document he or she submits, discovery request he or she propounds, discovery response he or she produces, transcript of a deposition or hearing in which he or she participates, or pleading or other paper to be submitted, filed, or served in these Proceedings contains Confidential Information or consists of Confidential Documents or Highly Confidential Documents, then such party may designate and stamp such Confidential Information and Documents as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL”. Each

such party shall include with his or her information or documents a public certification to the Board describing the confidential nature of the information or documents so designated. Unless any Public Entity Party or the Board objects to such certification, any information or documents so designated or stamped as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” shall be handled as provided for hereinafter.

4. Information and documents designated or stamped as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” may not be disclosed in any way, directly or indirectly, to any person or entity except to an employee, counsel, consultant, or agent of a party to these Proceedings, or an employee of such counsel, consultant, or agent, who, before receiving access to such information or documents, has been given and has read a copy of this Protective Order and has agreed to be bound by its terms by signing a confidentiality undertaking substantially in the form set forth at Exhibit A to this Order.

5. In the event that a party determines that additional individuals need access to “Highly Confidential” documents, the party must notify the opposing party: (1) identifying the individual or individuals to whom the party would like to disclose “HIGHLY CONFIDENTIAL” documents, and (2) identifying the “HIGHLY CONFIDENTIAL” documents to be disclosed, after which the opposing party has 24 hours either to consent or to object to the additional disclosure. If the opposing party objects to the additional disclosure, the “HIGHLY CONFIDENTIAL” documents will not be disclosed until the objection is resolved either by agreement of the parties or by the STB.

6. Any party to these Proceedings may challenge the designation by any other party of information or documents as “CONFIDENTIAL” or as “HIGHLY CONFIDENTIAL” by filing a motion with the STB to adjudicate such challenges.

7. Designated Material received in discovery must be kept either in the office of outside counsel or in the office of the Counsel of any Public Entity Party, may not be copied, and may not be used for any purposes, including without limitation any business, commercial, or competitive purposes, other than the preparation and presentation of evidence and argument in the Proceedings, and/or any judicial review proceedings in connection with the Proceedings and/or with any related proceedings. Notwithstanding the foregoing, any Designated Material that was in the possession of any party or publicly available to any party prior to the commencement of this proceeding may be retained and used for the purposes for which it was received by or available to that Public Entity Party.

8. Any party who receives Designated Material in discovery shall return or destroy such materials and any notes or documents reflecting such materials (other than file copies of pleadings or other documents filed with the STB and retained by counsel for a party to these Proceedings) at the earlier of: (1) such time as the party receiving the materials withdraws from these Proceedings, or (2) the completion of these Proceedings, including any petitions for reconsideration, appeals, or remands. Notwithstanding the foregoing, any Designated Material that was in the possession of any party prior to the commencement of this proceeding or publicly available to any party may be retained and used for the purposes for which it was received by or available to that party and such Designated Materials need not be returned or destroyed.

9. No party may include Designated Material in any pleading, brief, discovery request or response, or other document submitted to the STB unless the pleading or other document is submitted under seal pursuant to the rules of this Board.

10. No party may present or otherwise use any Designated Material at a hearing in these Proceedings, unless that party has previously submitted, under seal, all proposed exhibits

and other documents containing or reflecting such Designated Material to the STB to whom relevant authority has been lawfully delegated by the STB, and has accompanied such submission with a written request that the STB: (a) restrict attendance at the hearing during any discussion of such Designated Material, and (b) restrict access to any portion of the record or briefs reflecting discussion of such Designated Material in accordance with this Protective Order.

11. If any party intends to use any Designated Material in the course of any deposition in these Proceedings, that party shall so advise counsel for the party producing the Designated Material, counsel for the deponent, and all other counsel attending the deposition. Attendance at any portion of the deposition at which any Designated Material is used or discussed shall be restricted to persons who may review that material under the terms of this Protective Order. All portions of deposition transcripts or exhibits that consist of, refer to, or otherwise disclose Designated Material shall be filed under seal and be otherwise handled as provided in this Protective Order.

12. To the extent that materials reflecting Confidential Information are produced by a party in these Proceedings, and are held and/or used by the receiving person in compliance with paragraphs 1 - 5 above, such production, disclosure, holding, and use of the materials and of the data that the materials contain are deemed essential for the disposition of this and any related proceedings and will not be deemed a violation of any relevant provision of the ICC Termination Act of 1995.

13. All parties must comply with all of the provisions of this Protective Order unless the STB determines that good cause has been shown warranting suspension of any of the provisions herein.

14. Nothing in this Protective Order restricts the right of any party to disclose voluntarily any Confidential Information originated by that party, or to disclose voluntarily any Confidential Documents originated by that party, if such Confidential Information or Confidential Documents do not contain or reflect any Confidential Information originated by any other party.

15. Any party filing with the Board a "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" pleading in these Proceedings shall simultaneously file a public version of the pleading.

EXHIBIT A

CONFIDENTIALITY UNDERTAKING

I, _____, have read the Protective Order served on _____, 2010, governing the production and use of Confidential Information and Confidential Documents in STB Finance Docket No. 35407, Docket No. AB-6 (Sub-No. 463X) and Docket No. AB-6 (Sub-No. 465X), understand the same, and agree to be bound by its terms. I agree not to use or to permit the use of any documents or information marked as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" obtained pursuant to that Protective Order, or to use or to permit the use of any methodologies or techniques disclosed or information learned as a result of receiving such data or information, for any purpose other than the preparation and presentation of evidence and argument in STB Finance Docket No. 35407, Docket No. AB-6 (Sub-No. 463X) and Docket No. AB-6 (Sub-No. 465X), before the Surface Transportation Board ("Board"), and/or any judicial review proceedings in connection with STB Finance Docket No. 35407, Docket No. AB-6 (Sub-No. 463X) and Docket No. AB-6 (Sub-No. 465X). I further agree not to disclose any Confidential Information, Confidential Documents, Highly Confidential Information, Highly Confidential Documents, methodologies, techniques, or data obtained pursuant to the Protective Order except to persons who are also bound by the terms of the Order and who have executed Undertakings in the form hereof, and that, at the conclusion of this Proceeding (including any proceeding on administrative review, judicial review, or remand), I will promptly destroy any documents containing or reflecting materials designated or stamped as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL," other than file copies, kept by outside counsel, of pleadings and other documents filed with the Board.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that a party which asserts the confidential interest shall be entitled to specific performance and injunctive and/or other equitable relief as a remedy for any such breach. I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking, but shall be in addition to all remedies available at law or equity.

Signed: _____

Position: _____

Affiliation: _____

Date: _____

Certificate of Service

I hereby certify that I have this day caused to be served a copy of the foregoing **REPLY OF KING COUNTY, WASHINGTON TO MOTION OF GNP RLY, INC., FOR PROTECTIVE ORDER** to be served by first class mail, postage prepaid upon the following:

Tom Carpenter
International Paper
International Place I
6400 Poplar Avenue
Memphis, TN 38197

Kristy D. Clark
David T. Rankin
BNSF Railway Company
2500 Lou Menk Drive
AOB-3
Fort Worth, TX 76131

Matthew Cohen
Hunter Ferguson
Stoel Rives LLP
600 University Street, Suite 3600
Seattle, WA 98101

Don Davis
Master Builders Association of King and
Snohomish Counties
335 116th Avenue SE
Bellevue, WA 98004

John D. Heffner
James H.M. Savage
John D. Heffner, PLLC
1750 K Street, N.W., Suite 350
Washington, DC 20006

Kevin M. Sheys
Janie Sheng
K&L Gates LLP
1601 K Street, N.W.
Washington, DC 20006

Karl Morell
Ball Janik LLP
1455 F Street, N.W., Suite 225
Washington, DC 20005

Dean Kattler
Waste Management of Washington Inc.
13225 NE 126th Place
Kirkland, WA 98034

Denis Law
City of Renton
1055 South Grady Way
Renton, WA 98057

John F. Marchione
City of Redmond
16532 NE 98th Court
Redmond, WA 98052

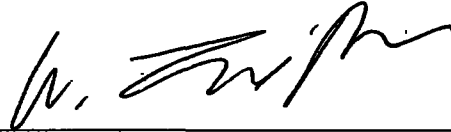
Isabel Safora
Port of Seattle
P. O. Box 1209
Seattle, WA 98111

Steve Sarkozy
City Manager
P. O. Box 90012
Bellevue, WA 98009

Kurt Triplett
City of Kirkland
125 5th Avenue
Kirkland, WA 98033

Ernest F. Wilson
17509 NE 38th Court
Redmond, WA 98052

Robert P. vom Eigen
Foley & Lardner LLP
3000 K Street, N.W., Suite 500
Washington, DC 20007

A handwritten signature in black ink, appearing to read 'W. Eric Pilsk', written over a horizontal line.

W. Eric Pilsk

Dated this 9th day of November, 2010